April 18, 2022

Clerk, Division Two
Court of Appeals
909 A Street, Suite 200
Tacoma, WA 98402-5115

Re: Brief Enclosed
Wallin v. DOC, No. 55795-9-II

Dear Clerk,

Please find enclosed a Respondent/Cross Appellant's Brief.

Please file with the court. Thank you.

Sincerely,

Jamie Wallin

Jamie Wallin DOC 729164
Washington State Penitentiary
1313 N. 13th Avenue
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Enclosure

P/M: 4/19/22

No. 55795-9-II

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION TWO

JAMIE WALLIN,

Respondent/Cross Appellant,

v.

WASHINGTON DEPARTMENT OF CORRECTIONS,

Appellant/Cross Respondent.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR THURSTON COUNTY

The Honorable Carol Murphy, Judge

RESPONDENT/CROSS APPELLANT'S BRIEF

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I. INTRODUCTION

Jamie Wallin, a prisoner in the custody of the Department of Corrections (DOC), made a request under the Public Records Act (PRA) for the Sex Offender Treatment Program records for all persons who participated in the program from 2003 through 2017 at one of its prisons. Assuming the records might contain some health care information, Mr. Wallin had instructed DOC to redact all personal identifying information from the records. SOTP participants are not patients, DOC policies do not treat SOTP records as health care records, and DOC concedes that SOTP counselors do not diagnose any mental health disorders or conditions. DOC policies subjugate SOTP records to the PRA and segregate the program from its other medical and mental health services and health care records. While DOC initially stated only some information within the SOTP records were exempt, it withheld the entire records under a claim of exemption pursuant to the Uniform Health Care Information Act, RCW 70.02.

Without an in camera review of the records, the trial court held a merits hearing and made a bench finding that presumed the records contained some health care information. Even so, the trial court correctly found that the SOTP records were subject to the PRA and aptly recognized that the records were not records of patients, but were records from one of DOC's programs. It ruled that DOC violated the PRA by failing to collect and redact the records in response to Mr. Wallin's

public record request under the PRA.

Mr. Wallin then sought an order requiring DOC to produce the records within a certain timeframe, and DOC moved for reconsideration and clarification. DOC maintained the records were exclusively governed by RCW 70.02 and that the records were all contained in a singular treatment file for each participant thereby rendering them patient files under the UHCIA. The court denied all the motions but did correctly clarify that DOC must conduct a reasonable search, collect records, determine any appropriate redactions, and provide a response to Mr. Wallin with all non-exempt records or redacted records consistent with statutory and case law.

In the penalty phase, Mr. Wallin moved for a stay to conduct discovery on the issue of bad faith, which the trial court denied. The court then found that DOC did not act in bad faith, denied Mr. Wallin penalties, and improperly reduced his award of costs by half.

DOC appeals from the orders from the PRA merits hearing and the motion for reconsideration, and Mr. Wallin cross-appeals the order on costs and penalties.

For this appeal, the trial court had rightly ordered DOC to gather, redact, and provide the SOTP records to Mr. Wallin. The court recognized that SOTP records are from a program of DOC rather than for its health services such as medical and mental health, but assumed that the records may contain health

care information as did Mr. Wallin. The trial court correctly ruled that the SOTP records were subject to the PRA and that DOC violated the PRA by failing to redact and produce the records. However, DOC now argues, for the first time, that the records cannot be deidentified; and further argues, for the first time, that the SOTP records are mental health treatment records. DOC's premise is not only wrong, but those arguments are waived and estopped and should not be considered by this Court. This Court should affirm the trial court's March and April 2021 orders.

At the same time, however, the trial court did err by refusing to grant Mr. Wallin discovery on the bad faith issue with regard to penalties, and erred by failing to find that DOC acted in bad faith by withholding public records contrary to prior judicial decisions and its own policies. The trial court also erred by reducing the award of costs absent evidence of fraud or other malfeasance on the part of Mr. Wallin, and by mandating it be sent to his prison account. This Court should reverse the trial court's June 2021 order, and hold that DOC acted in bad faith, award all costs, and remand on the issue of the proper amount of daily penalties.

II. ASSIGNMENTS OF ERROR

1. **The trial court erred by reducing Wallin's award of costs and mandating it be paid to his prison account.**
2. **The trial court erred by concluding that DOC did not act in bad faith and denying penalties.**

III. ISSUES RELATED TO ASSIGNMENTS OF ERROR

1. Whether the trial court erred by concluding that Wallin's costs should be reduced absent a finding of fraud or other malfeasance?

2. Whether the trial court should have allowed Wallin discovery on the issue of bad faith with regard to penalties?

3. Whether the DOC acted in bad faith necessitating daily penalties?

IV. STATEMENT OF THE CASE

A. Public Records Request

In October 2018, Jamie Wallin, a prisoner[1] confined in the Department of Corrections (DOC), submitted a public records request to DOC which sought, in pertinent part:

> 1. All Sex Offender Treatment Program (SOTP) records for persons who participated in SOTP, as well as the SOTP Aftercare Program, at the Washington Corrections Center for Women (WCCW), from the period of January 1, 2003 through December 31, 2017. These records are to include, but are not limited to: evaluations, primary encounter reports, treatment notes, handwritten provider notes, treatment forms, treatment logs, treatment summaries, and other forms, to include signed DOC forms related to SOTP programs, such as, DOC 02-194 (program screening and application), DOC 02-330 (Informed Consent), DOC 02-406 (Release of Confidential Information), DOC 14-003 (Confidentiality Statement), et cetera.

CP 148. Because Mr. Wallin assumed the records might contain some health care information, VRP 6, he instructed DOC to redact "all personal identifying information, e.g., name, DOC number, date of birth, SSN number, et cetera, of each person

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[1] Agencies cannot distinguish among persons requesting records. RCW 42.56.080(2).

to conform to the disclosure requirements of chapter 70.02 and 42.56 RCW, and the holding in Prison Legal News v. Dep't of Corr., 154 Wn.2d 628, 644-45 (2005)[.]". CP 148.

In March 2019, DOC refused to produce the records because "the information contained in these records is exempt" under RCW 70.02.020(1), the Uniform Health Care Information Act (UHCIA),[2] and withheld the records absent a signed release or court order. CP 172. The SOTP records encompass the files of 96 persons, estimated to be in the thousands of pages. CP 120.

B. **Sex Offender Treatment Program**

DOC administers a Sex Offender Treatment Program (SOTP) and an Aftercare Program at its prisons. CP 116-17. The entire program employs 69 staff with an operating budget of 14 million dollars paid for by the taxpayers. CP 115. The SOTP program is a two-year, evidence-based cognitive behavior program for intervention and relapse prevention built on the premise that changing the thinking of convicted offenders to interfere with their thinking patterns supportive of sexually reoffending is the most effective way to "treat" those sexual offenders and manage the risk of future sexual offenses prior to reintegration into society. CP 116, 118, 124.

The SOTP program is strictly voluntary. CP 124. The program is delivered through counselors licensed by the

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[2] RCW 70.02.020(1) states that "a health care provider may not disclose health care information about a patient to any other person without the patient's written authorization."

department of health, most of whom have no more than a master's degree in counseling. CP 119. While DOC considers the program a per se "treatment" program, its counselors do not diagnose any mental health disorders or conditions. CP 119.

Although DOC policy 570.000 treats SOTP records with an air of "confidentiality", CP 129, DOC's other policies do not consider those records as health care records. CP 411-12. DOC's other services such as medical and mental health services are covered by other policies not associated with the SOTP program. CP 411-12. SOTP records, as a record group, are subject to the Public Records Act, RCW 42.56. CP 540-46. SOTP participants must sign various informed consent and waiver forms before entering the program. CP 134.

Particularly, form DOC 02-330 (Rules of Confidentiality and Informed Consent)[3] informs the SOTP participant that most information received during the course of the program, whether written or verbal, is not confidential.[4] Participants are required to make full historical and factual disclosures in weekly group sessions with other offenders. CP 118-19.

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[3] That form and form DOC 02-194 is the subject of Mr. Wallin's RAP 9.11 motion to take additional evidence, pending before this Court.

[4] That includes, inter alia, all assessments, evaluations, historical offense information, narrative summaries, progress summaries, provider notes, offense patterns, relapse prevention plans, and other various information, etc.; and any information disclosed to third parties, including within DOC.

C. Superior Court Proceedings

Mr. Wallin filed a PRA suit to compel production of the SOTP records. CP 2-7. The trial court held a merits hearing and made a bench ruling, finding the SOTP records contained health care information based on the language of Mr. Wallin's request and DOC's claim. VRP 31. After requesting additional briefing, the court concluded that Mr. Wallin did not make a "request for patient files, but that the records requested did contain health care information, which is exempt from disclosure." CP 373-74. The court noted the "request references a particular program of DOC and DOC forms", and recognized that DOC's "response did not state that the records were patient files, it stated that the requested records reflect confidential patient treatment details, and the information contained in the records is exempt." CP 375. The court ruled DOC "violated the PRA by failing to collect and redact the records in response to Plaintiff's request." CP 374.

Mr. Wallin sought an order requiring DOC to produce the records within a certain timeframe, and DOC filed a motion for reconsideration and clarification. CP 395; CP 378. DOC maintained that the requested records were all contained in clinical treatment files, and sought clarification as to whether the court was ordering the production of records and which redactions to make. CP 379. The court denied all the

motions and made clear that DOC must "conduct a reasonable search, collect records, determine any appropriate redactions, and provide a response to the Plaintiff with all non-exempt records or redacted records consistent with statutory and case law." CP 434. DOC then sought discretionary review of the orders from the PRA merits hearing and from its motion for reconsideration. CP 441-50.

The court set a hearing to address costs and penalties. At that point in the proceedings Mr. Wallin moved for a stay of the case to engage in discovery on the issue of bad faith. CP 395. The court denied the motion. CP 434. The court found that DOC did not act in bad faith and denied penalties. CP 551. The court also reduced Mr. Wallin's costs by 50% and ordered that it be paid to his prison inmate account. CP 550. Mr. Wallin filed a motion for reconsideration for both the denial of penalties and reduction of costs. CP 555. Mr. Wallin argued the DOC acted in bad faith, that he was entitled to all costs, and that the costs he expended eminated from his personal bank account. CP 554, 555-65. The court denied the motion. CP 589.

After the case concluded, DOC appealed the PRA violation. CP 566-81. And Mr. Wallin cross-appealed the orders which denied a stay and discovery on the issue of bad faith, denied penalties, reduced his costs, and denied reconsideration. CP 591-602.

V. STANDARD OF REVIEW

The proper standard of appellate review for most issues challenged in a PRA action is de novo. RCW 42.56.550(3). When the record consists only of affidavits, memoranda of law, and other documentary evidence, the appellate court stands in the same position as the trial court. O'Connor v. Dep't of Soc. & Health Svcs., 143 Wn.2d 895, 904, 25 P.3d 426 (2001). The application of a statute to a fact pattern is a question of law fully reviewable on appeal. Ameriquest Mortg. Co. v. Ofc. of Attorney General of Wash., 177 Wn.2d 467, 478, 300 P.3d 799 (2013). The interpretation of case law is also de novo. Id.

Other types of rulings such as reconsideration of issues are reviewed for abuse of discretion. West v. Thurston County, 144 Wn.App. 573, 579-80, 183 P.3d 346 (2008). A court abuses its discretion when it adopts a view "that no reasonable person would take" or when it bases its decision on "untenable grounds or reasons." Wade's Eastside Gun Shop v. Dep't of Labor & Industries, 185 Wn.2d 270, 277, 372 P.3d 97 (2016).

VI. ARGUMENT

"A foolish consistency is the hobgoblin of little minds."

-- Ralph Waldo Emerson.

DOC continuously claims the Sex Offender Treatment Program records are clinical patient files. They are not. DOC also repeatedly asserts the SOTP records are obtainable only through the Uniform Health Care Information Act. Incorrect. And it

perpetually insists the PRA does not apply to the SOTP records. It does. Further, DOC also claims that Mr. Wallin is not entitled to all his costs. Yet he is. And it contends it did not act in bad faith when it denied his right to inspect and copy a public record. Yet it did.

DOC is a public agency so the trial court had correctly concluded as a matter of law that the SOTP program records were subject to the PRA. DOC's own policies distinguish between the SOTP program and it other contractual health care services such as its medical, dental, and mental health services; and SOTP records are kept separate from its health care records.

While the trial court correctly determined that the SOTP records are subject to the PRA, it is unknown whether the records actually contain any health care information. That ambiguity need not be resolved because Mr. Wallin specifically instructed DOC to redact all personal identifying information. DOC has continued to refuse to collect and redact the records, and its stubborn refusal to provide the public records for inspection and copying constitutes bad faith. As a prevailing party, Mr. Wallin is entitled to all costs, including those incurred on appeal.

A. The Trial Court Did Not Err In Concluding The Records Were Subject To The PRA And Ordering DOC To Produce The Records.

The trial court correctly determined that the SOTP records were subject to the PRA. Even if the records do contain some

health care information, the PRA imports privacy provisions which allow redaction of the personal identifying information for release under the PRA. DOC errs by calling the SOTP records "patient records" and by arguing that the UHCIA is Mr. Wallin's sole vehicle for obtaining all of the records he requested, in contravention of its own written policies, case law, and statutory provisions.

1. **The PRA Governs Requests For Public Records Held By A Public Agency Even When The Record Contains Health Care Information.**

The Public Records Act, chapter 42.56 RCW, "is a strongly worded mandate for broad disclosure of public records." Hearst Corp. v. Hoppe, 90 Wn.2d 123, 127, 580 P.2d 246 (1978); RCW 42.56.030. The PRA's strict production requirement is broadly construed and its exemptions are narrowly construed to implement this purpose. RCW 42.56.030. Therefore, the PRA requires that every state and local agency produce any nonexempt public record upon request. See RCW 42.56.070(1); RCW 42.56.080(2); RCW 42.56.520(1). In a PRA action, the burden of proof rests with the agency to establish that its refusal to produce withheld records is consistent with a statute that exempts or prohibits disclosure. RCW 42.56.550(1).

There is no question that DOC is a public agency, and the records which contain information related to its conduct or the performance of its governmental function which it prepares, owns, uses, or retains, are subject to the PRA's provisions.

RCW 42.56.010(1), (3). On that the law is clear. What is unclear, however, is why DOC senselessly argues against clear and well established law. DOC ignores case law and statutory provisions that provide that the PRA and UHCIA work together when requested public records held by a public agency contain health care information.

In 1991, the legislature enacted the UHCIA, chapter 70.02 RCW. Laws of 1991, ch. 335, §§ 101-907. The intent was to protect the health care information of patients by establishing clear and certain rules for the access to and disclosure of that information by health care providers. RCW 70.02.005. Health care information is defined as any

> information, whether oral or recorded in any form or medium, that identifies or can readily be associated with the identity of a patient and directly relates to the patient's health care[.]

RCW 70.02.010(17). Health care is defined as

> any care, service, or procedure provided by a health care provider: (a) To diagnose, treat, or maintain a patient's physical or mental condition; or (b) That affects the structure or any function of the human body.

RCW 70.02.010(15). A health care provider[5] is

> a person who is licensed, certified, registered, or otherwise authorized by the law of this state to provide health care in the ordinary course of business or practice of a profession.

RCW 70.02.010(19).

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[5] DOC is not a health care provider. John Doe G v. Dep't of Corr., 197 Wn.App. 609, 620 n.32, 391 P.3d 496 (2017).

As part of the 1991 legislation, in order to apply the privacy provisions of the UHCIA to public agencies holding public records containing health care information, RCW 42.17.312 was codified into the former public disclosure act (PDA). Laws of 1991, ch. 335, § 902 ("Chapter 70.02 RCW applies to public inspection and copying of health care information of patients."). CP 343-44. Later, in 2005, the legislature recodified the public records disclosure portions from the former PDA into a separate chapter, the PRA, at 42.56 RCW. Laws of 2005, ch. 274. Former RCW 42.17.312 then became RCW 42.56.360(2) with no changes.

Through RCW 42.56.360(2), the PRA incorporates the UHCIA's privacy provisions into the PRA. See Lee v. City of Seattle, 2018 Wash. App. LEXIS 1148, ¶ 39 (Div. 1 2018) (unpublished)[6] ("RCW 70.02.020 is incorporated into the PRA through RCW 42.56.360(2)"); John Doe P v. Thurston County, 199 Wn.App. 280, 297, 399 P.3d 1195 (2017) (stating "the PRA's UHCIA exemption 'incorporates RCW 70.02.020 into the PRA and thus restricts disclosures by' an agency"); John Doe G v. Dep't of Corr., 197 Wn.App. 609, 619, 391 P.3d 496 (2017) ("Th[e] exemption incorporates the confidentiality provisions of Washington's UHCIA"); Simpson v. Okanogan County, 2011 Wash.App. LEXIS 987, ¶ 13 (Div. 3 2011) (unpublished)[6] ("The exemption for patient

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[6] Cited pursuant to GR 14.1 as nonbinding authority.

health care records is assessed in accordance with the standards of chapter 70.02 RCW, which is incorporated into the PRA by RCW 42.56.360(2)"); and Prison Legal News v. Dep't of Corr., 154 Wn.2d 628, 644, 115 P.3d 316 (2005) (discussing former RCW 42.17.312 (1991) which is identical to current RCW 42.56.360(2) (2005) and requiring the DOC to produce records containing deidentified health care information under the PRA).

Courts have been consistent in holding that the UHCIA is incorporated into the PRA. This is rightly so considering most state, local and governmental agencies--all of which possess public records, some of which could contain some health care information--are not health care providers themselves. John Doe G, 197 Wn.App. at 620 n.32. It was the legislative intent to apply the UHCIA's disclosure privacy provisions to agencies that are not health care providers when health care info is contained within public records requested through the PRA by the public. See RCW 70.02.005(4) ("It is the public policy of this state that a patient's interest in the proper use and disclosure of the patient's health care information survives even when the information is held by persons other than health care providers.").

The legislature fully intended that the UHCIA work in tandem with the PRA when public agencies possess records with health care information. See RCW 42.56.360(2) ("Chapter 70.02 RCW applies to public inspection and copying of health care

information of patients."). DOC interprets the PRA's health care inclusion statute, RCW 42.56.360(2), as an exclusion. But the historical context surrounding the enaction of the UHCIA and its attachment to the PRA undercuts any foundation for DOC's interpretation.

An example of this is in the event of a conflict between the UHCIA and PRA. In RCW 70.02.090, a health care provider may fully deny access to health care information if certain exemptions apply, but it also plainly states the UHCIA is "[s]ubject to any conflicting requirement in the public records act, chapter 42.56 RCW[.]" RCW 70.02.090(1). Likewise, the PRA states that "[i]n the event of a conflict between the provisions of [the PRA] and any other act, the provisions of [the PRA] shall govern." RCW 42.56.030.

By contrast, to further show the harmony between the PRA and UHCIA, the UHCIA also contains two specific provisions which exempts certain information "from public inspection and copying pursuant to chapter 42.56 RCW". RCW 70.02.050(2)(a) exempts records provided to public health authorities; and RCW 70.02.220(7) exempts records related to sexually transmitted diseases as provided to public health authorities. Those limited exemptions, while not at issue here, demonstrate that all other records containing health care information are subject to PRA mandates--at least when those records are held by a public agency.

Other secondary authorities show the legislative kinship of the UHCIA and PRA. For instance, the administrative rules for the department of health concerning the public disclosure of health records containing health care information, chapter 246-08 WAC, states that "[c]hapters 70.02 and 42.56 apply to the public inspection and copying of health information." WAC 246-08-390(6)(a) (emphasis added). While that subsection does restrict public disclosure of unredacted records by stating that "[h]ealth information that identifies or can readily be associated with the identity of a patient and directly relates to the patient's health care is not available for public inspection and copying", it does also expressly provide for the "deidentification" of records for public release under the PRA. See WAC 246-08-390(6)(a)(i)-(iii).

In another example, in 1997 the state attorney general issued a written opinion relating to diet forms submitted to the department of health under the UHCIA. Although the diet forms contained both health care information and personal information exempt from inspection and copying, if that personal information was deleted then the remaining record was subject to public disclosure under the former PDA. See AGO 1997 No. 2; 1997 Wash. Op. Att'y Gen. No. 2 (1997).

DOC urges that the UHCIA contains its own access provision so that the UHCIA is the exclusive means of obtaining records. It claims that "outcome is confirmed by the relevant statutory

language, precedent, and important public policy concerns." Petitioner's Brief at 15-16. DOC's arguments are unsound. The statutory language, precedent, and secondary authorities cited above directly militate against its claims, and public policy arguments are for the legislature, not the appellate courts.

Here, DOC argues that the UHCIA is the exclusive means for obtaining records it terms "patient records". It cites to the "plain language" of RCW 42.56.360(2) to argue that the the legislature intended the "'inspection and copying' of records that may normally occur under RCW 42.56 to be removed from the PRA and governed by the access provisions of RCW 70.02." Petitioner's Brief at 16-17.[7] As the authorities cited above have already held, the PRA incorporates the UHCIA's privacy provisions into the PRA. Contrary to DOC's argument, the legislature intended the UHCIA to become subject to the PRA, see RCW 70.02.090(1); and in other limited circumstances exempts itself from PRA requirements, see RCW 70.02.050(2)(a) and RCW 70.02.220(7). The two acts are intended to apply concurrently when public agencies possess public records which contain health care information. RCW 42.56.360(2).

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[7] DOC reads the UHCIA/PRA statutes backwards. When the record is held by a health care provider, the UHCIA access provisions apply. RCW 70.02.020. When the record is held by a public agency (a non-health care provider), the UHCIA's privacy provisions are incorporated into the PRA and the PRA's production and redaction provisions apply. RCW 42.56.360(2); RCW 42.56.070(1).

DOC also tries to distinguish Oliver v. Harborview Medical Center, 94 Wn.2d 559, 618 P.2d 76 (1980) based on subrogation by the UHCIA, and Prison Legal News v. Dep't of Corr., 154 Wn.2d 628, 115 P.3d 316 (2005) (PLN) based on inapplicability, both of which the trial court relied upon in its rulings.[8] CP 375-76.

In Oliver, the supreme court considered whether a patient's medical records were disclosable under the former PDA. Because the records were held by a state-run hospital, the court recognized the patient-requestor's right to inspect and copy her own medical records which were public records held by a public agency. Oliver, 94 Wn.2d at 565-68.

DOC argues that the UHCIA supplanted the decision in Oliver. Petitioner's Brief at 17. But DOC's argument is premised on its misreading of RCW 42.56.360(2). Applying Oliver, even post-UHCIA enaction, does not change the result here. Any writing, as that term is defined in the PRA, when related to the conduct of government or its function prepared, owned, used, or retained by an agency, is a public record. RCW 42.56.010. When the UHCIA was later enacted after Oliver, the legislature incorporated disclosure provisions to apply to public agencies when those agencies possess public records containing health care information. RCW 42.56.360(2) [former

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[8] In granting review, the Commissioner also concluded that PLN applies in this case. Ruling Granting Disc. Review at 6 & n.2.

RCW 42.17.312] (incorporating privacy provisions into PRA); RCW 70.02.090(1) (UHCIA subject to conflicting requirements in PRA); and RCW 70.02.005(4) (intent to apply UHCIA to non-health care providers). The legislative enaction of the UHCIA did not overrule the holding in Oliver; it affirmed it.

And in PLN, the supreme court examined both the UHCIA and PRA together to medical information contained in investigative records related to medical misconduct by DOC doctors alleged to have killed and maimed their prisoner-patients. PLN, 154 Wn.2d at 632-34. Relying on the UHCIA's definition of "health care information", the court had concluded that DOC violated the PRA by its blanketed redaction of all medical information which concerned inmates, including their names, treatments, and medical conditions, etc. Id. at 644-45. The court held that in order to redact information such as the medical conditions suffered by the patients, DOC needed to demonstrate that the information could still be readily associated with a specific patient when the patient's identity was not otherwise known. Id. at 648.

In spite of DOC's assertion to the contrary, the decision in PLN applies to any public record, regardless of physical form or characteristic, containing health care information. PLN required DOC to produce the records containing health care information under the PRA with the identities of the prisoners redacted. PLN, 154 Wn.2d at 648. The same holds true here.

DOC also makes various other arguments, such as that the "acts cannot be read to apply concurrently to requests for patient files", and that the UHCIA's assess provision "weigh[s] against interpreting the PRA as a method of accessing patient files."[9] Petitioner's Brief at 18-20. While it is true that the UHCIA favors the protection of patient confidentiality, that personal confidentiality is protected when public records containing health care information are produced under the PRA.

The "definition of 'health care information' has two requisites--patient identity and information about the patient's health care." Wright v. Jeckle, 121 Wn.App. 624, 630, 90 P.3d 65 (2004); RCW 70.02.010(17). "On its face, the statute appears to allow for disclosure of information such as maladies, treatments, etc., when the identity of a patient is not disclosed or cannot be readily associated with the patient." PLN, 154 Wn.2d at 645. So producing public records containing health care information, as long as the personal identifying information is redacted, renders the remaining record disclosable. PLN, at 648. As discussed earlier, the PRA incorporates the UHCIA's patient privacy provisions into

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[9] DOC continuously calls the SOTP records "patient files" or "clinical treatment files", and bases the validity of all of its arguments on those terms of art. But neither the UHCIA nor the PRA recognize such a demarcated distinction. Compare RCW 70.02.010(17) (definition of "health care information"); and RCW 42.56.010(3), (4) (definitions of "public record" and "writing").

the PRA. RCW 42.56.360(2). Therefore both the PRA and UHCIA work concurrently.[10]

DOC also cites the unpublished opinion of Stetson v. Dep't of Corr. to argue that the PRA and UHCIA cannot be applied concurrently. Petitioner's Brief at 21-22. But Mr. Stetson was requesting his own files, unredacted, with both his identity and information about his health care intact. In other words, Stetson was one prisoner who was requesting his own medical records, thus, it is inapplicable. It appears DOC fails to recognize the distinction between records requested under the PRA, i.e. where patient identity is protected, and records produced under the UHCIA, i.e. where patients access their own unredacted records. Stetson does not apply here.[11]

Finally, DOC makes a public policy argument to support its claims. First, its policy argument is foreclosed by the the legislature's intent to apply the UHCIA to the PRA when public records containing health care information are requested from a public agency. See RCW 42.56.360(2); RCW 70.02.090(1), RCW

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[10] DOC also raises the UHCIA's 14-day notice requirement to argue that the acts cannot work concurrently. But that ignores the identity redaction requirement under the UHCIA, PRA, and PLN. Mr. Wallin told DOC to redact all personal identifying information from the SOTP records. CP 148. He is not trying to obtain both patient identity and information about the patient's health care in unredacted form.

[11] In granting review, the Commissioner also concluded that Stetson was inapplicable. Ruling Granting Disc. Review at 6 n.2. The trial court distinguished Stetson for the same reason. CP 376.

70.02.005(4). Secondly, it is foreclosed by the many judicial opinions recognizing that the UHCIA privacy provisions are incorporated into the PRA. See pages 13-14, supra (citing cases). And lastly, "[p]ublic policy arguments should be 'addressed to the Legislature, not to the courts.'" King County v. Frank Coluccio Constr. Co., 3 Wn.App. 504, 416 P.3d 756, 762 (2018) (quoting Blomster v. Nordstrom, Inc., 103 Wn.App. 252, 258, 11 P.3d 883 (2000)).

While DOC may protest its obligations under the PRA, this Court is "charged with carrying out the PRA." O'Neill v. City of Shoreline, 170 Wn.2d 138, 149, 240 P.3d 1149 (2010). It is to "declare the law and effect of the statute; [and it] need provide no deference to an agency's interpretation of the PRA." Id. (citing Hearst Corp., 90 Wn.2d at 130).

2. The Requested SOTP Records Are Public Records Within The Meaning Of The PRA And Subject To Collection, Redaction And Production.

There is no disputing the SOTP records are a "writing containing information relating to the conduct of government or the performance of any governmental or proprietary function." RCW 42.56.010(3). DOC is a state governmental agency, and has developed and administers the SOTP and its Aftercare Program at its facilities. CP 116-17; RCW 42.56.010(1). The SOTP records are clearly prepared, owned, used, and retained by DOC for its administration of the program and for other third party uses. CP 117-18, 119-20; RCW 42.56.010(3). Accordingly, they are

subject to the PRA's mandates of inspection and copying. RCW 42.56.070(1); RCW 42.56.520.

DOC argues a claim that because it stores SOTP records in one location that it renders an SOTP file a "clinical treatment file" not subject to the PRA.[12] DOC raises the point to argue the trial court mistakenly found that Mr. Wallin sought records outside of the SOTP files. DOC cobbles together the storage location of the records, the language of Mr. Wallin's request, and two statements from the trial court to contend the trial court made an "error" warranting reversal. The court made no such error, and DOC misinterprets the court's statements.

DOC first points to Mr. Wallin's request which sought all SOTP records for persons who participated in SOTP. It then cites the declaration of the SOTP director to evince the fact that DOC stores SOTP files in one location. It then opines the trial court erred by its "finding" that Mr. Wallin sought records outside the SOTP files, and as support, points to the court's conclusion regarding medical records and the UHCIA. Petitioner's Brief at 24-29.

The court made these two statements in its Amended Order:

> The Defendant's responses consistently indicated the program records requested contain or include treatment records. While that is true based upon this record, it is

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[12] The PRA does not recognize any distinction in where records are stored; only that a record fits the definition of a "public record." RCW 42.56.010(3). A storage location is irrelevant.

> less clear whether the request was specifically and solely for patient files, especially because the request references a particular program of DOC and DOC forms. The Defendant's response did not state that the records requested were patient files, it stated that the requested records reflect confidential patient details, and the information contained in the records is exempt.
>
> ....
>
> The law seems to recognize that a request for a particular patient's medical record is governed exclusively by RCW 70.02, although the parties have been unable to locate a published case on that point. Here, documents responsive to the request are public records and certainly include health care information. However, it does not appear that the Plaintiff's broad request was for patient files specifically and exclusively.

CP 375, 376. Taking both statements in totality, the trial court's reference to "patient files" was in fact a reference to medical records; whereas it distinguished the SOTP program records as being outside of that purview. This is where DOC errs in its interpretation of the trial court's conclusions.

The trial court differentiated between medical records, which it termed "patient files", and the program records which it concluded contained health care information. Because DOC here also terms the SOTP records as "patient files", DOC has improperly correllated its reference and the court's reference as being one-and-the-same. They are not.

The trial court understood exactly what Mr. Wallin was requesting; his request was plain on its face. CP 148. The court also understood through long experience that DOC keeps all sorts of files on DOC inmates, to include what it termed "patient files" which includes medical, dental, and mental

health records. Compare CP 411-12, 542-46. The trial court understood that Mr. Wallin's request was not for health care records, and that the SOTP records and DOC forms Mr. Wallin requested were outside of that other health care file. Hence the trial court's assimilation that Mr. Wallin's request "references a particular program of DOC and DOC forms", and specifically noted that DOC's response "did not state that the records requested were patient files, it stated that the requested records reflect confidential patient details, and the information contained in the records is exempt." CP 375, 376. The trial court deduced correctly. As Oliver Wendell Holmes put it, "the life of the law has not been logic; it has been experience." The trial court did not err.

Moreover, DOC's own policies intentionally distinguish between its health care records of prisoners and records of its general programs, such as the SOTP. CP 411-12. Although DOC fuses terms, a "patient file" in the context of the entirety of DOC's upkeep of information and records about a prisoner includes only the health care record, i.e., medical, dental, and mental health records. A "patient file", then, does not include general program records like the SOTP records.

Strikingly, DOC's own retention polices not only also distinguish between health care records and SOTP records, but it subjects SOTP records to the PRA. CP 544 (SOTP records: "The release of information is now governed by existing Public

Disclosure laws (chapter 42.56 RCW) and any applicable exemptions."). That fact, along with the others described above, abrogates DOC's argument that the SOTP records are the same as the "patient files" (i.e., "medical record") referred to by the trial court. Instead, the SOTP records are public records, possibly containing some health care information within them, subject to the production mandates of the PRA. DOC's argument to the contrary is groundless.

B. The Redaction And Production Requirements Of The PRA Require DOC To Deidentify The SOTP Records Per The UHCIA For Release Under The PRA.

The PRA requires that public records be produced for inspection and copying. If an exemption applies, the record, or a portion thereof, can be withheld. The UHCIA, as has been incorporated into the PRA, requires the identity of the SOTP participants to be redacted from the records. Deidentification renders the remaining record disclosable under the PRA.

However, DOC argues two new claims raised for the first time in this appeal and never raised in the trial court. DOC argues the records are mental health records pursuant to RCW 70.02.230(1) and are exempt in their entirety; and that the records are not capable of deidentification. Those arguments have been waived by DOC and should not be considered by this Court. Nevertheless, DOC's claims are without merit as the "confidentiality" it affords the SOTP records is waived by each participant before entering the program.

1. DOC's New Claims Raised For The First Time In This Appeal To Support Its Second Assignment Of Error Are Waived And Precluded By RAP 2.5.

At the merits hearing, DOC generally argued the SOTP records were patient medical records solely governed by the UHCIA, RCW 70.02. VRP 13. The trial court made the bench finding which presumed the records contained health care information. VRP 31. After concluding the records were not for patient files but a program of DOC, the court found that DOC violated the PRA and ordered the collection, redaction, and production of the records. CP 373-77, 433-35.

In its Petitioner's Brief to this Court, DOC raises two new issues to solely support its Second Assignment of Error:[13] (a) the SOTP records are mental health records exempt under RCW 70.02.230(1); and (b) DOC cannot deidentify the records. See Petitioner's Brief at 30-31. Neither issue was raised at any time in any of DOC's trial court briefing or by DOC at the merits hearing. Compare CP 92-106, 295-304, 378-84, 423-26; VRP 10-18.

Under RAP 2.5, parties are precluded from raising "any claim of error which was not raised in the trial court." RAP 2.5(a). Sheats v. City of East Wenatchee, 6 Wn.App.2d 523, 431

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[13] Mr. Wallin has moved this Court to strike DOC's second assignment of error and underlying arguments; alternatively, to direct the trial court to take additional evidence for this Court's review in this matter. The motion is pending. See Motion to Strike Portions of Petitioner's Brief.

P.3d 489, 498 (2018) ("In general, an argument not raised in the trial court is waived on appeal"; citing RAP 2.5(a)). "While an appellate court retains the discretion to consider an issue raised for the first time on appeal, such discretion is rarely exercised." Karlberg v. Otten, 167 Wn.App. 522, 531, 280 P.3d 1123 (2012).

RAP 2.5(a) "reflects a policy of encouraging the efficient use of judicial resources." State v. Scott, 110 Wn.2d 682, 685, 757 P.2d 492 (1988). Accordingly, a trial court "must be given a chance to review and correct the claimed error before the matter can be reviewed" by the appellate court. State v. Hammond, 64 Wn.2d 591, 593, 392 P.2d 1010 (1964).

DOC's arguments raised here for the first time that RCW 70.02.230(1) exempts SOTP records as mental health records, and that the records are not capable of being deidentified for release, have been implicitly waived. There is no trial court record to review, no briefing on the issues, and no way for Mr. Wallin to properly countervail DOC's claims without expanding the record in this case with new evidence.

DOC had every opportunity to raise those two issues before the trial court. It made a conscious decision to **not** do so. Those issues are now waived, they do not meet the criteria for review in RAP 2.5, and this Court should decline to reach them.

Nevertheless, DOC's claims are without merit because any public record containing health care information, regardless of

physical form or characteristics, is subject to the PRA; and DOC's self-imposed rule of "confidentiality" it gives the SOTP records is explicitly waived by each SOTP participant before entering the program.

2. The PRA's Incorporation Of The UHCIA's Personal Identity Privacy Provisions Applies To All Types Of Public Records With Health Care Information.

Although the issue has been waived by DOC for the reasons set forth above, its claim that the SOTP records are mental health records exempt in their entirety under RCW 70.02.230(1) is meritless.[14]

DOC has already argued that the UHCIA as a whole, chapter 70.02 RCW, solely applies to the SOTP records. VRP 11; CP 102. That argument necessarily includes all sections and subsections within the UHCIA, including RCW 70.02.230(1). Therefore DOC is making a circular argument. It now claims the records are exempt under a part of the UHCIA where it has already argued the records are exempt under the UHCIA. DOC has circled back to the beginning of its original claim.

As discussed earlier, the UHCIA only exempts two types of records entirely from public disclosure: RCW 70.02.050(2)(a) exempts records provided to public health authorities; and RCW

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[14] As noted earlier, Mr. Wallin has submitted a motion to expand the record, to include DOC's Mental Health Services and its Health Plan policies. See Motion to Strike at 5-6. The evidence counters DOC's contention that the SOTP is part of its mental health services of inmates.

70.02.220(7) exempts records related to sexually transmitted diseases as provided to public health authorities. All other records containing health care information, if they are public records prepared, owned, used, or retained by any state or local agency, are records subject to the PRA. To protect the patient's identity, the PRA incorporates the UHCIA's personal identity privacy provisions. RCW 42.56.360(2). Likewise, the UHCIA subjects itself to the PRA in the event of a conflict. RCW 70.02.090(1) (the UHCIA is "[s]ubject to any conflicting requirement in the public records act, chapter 42.56 RCW[.]"); RCW 42.56.030 (same).

Although not part of this record on review, assuming, arguendo, that the SOTP records were created as part of DOC's mental health services to inmates under its Mental Health Services policy and its DOC Health Plan, the PRA still applies because the records are public records. Thus, the UHCIA's privacy provisions, as incorporated into the PRA by RCW 42.56.360(2), apply to restrict disclosure of patient identity when the remaining record containing the information about the patient's health care is produced under the PRA. PLN, 154 Wn.2d at 644-46. Although DOC's claim is waived here, its position nevertheless remains untenable.

3. **It Is Possible To Deidentify The SOTP Records; Records And Information DOC Claims Is Confidential Is Waived By SOTP Participants Before Entering The Program.**

While the issue has been waived by DOC for the reasons set

forth above, its newest claim that the SOTP records cannot be deidentified is misrepresented and spurious.[15]

In response to Mr. Wallin's request, and throughout trial court proceedings, DOC has refused to collect the responsive SOTP records. Therefore it has not reviewed any of the records for redactions. CP 375 (court declining to address redactions because "no records were produced in response to the request"). Likewise, in its motion for reconsideration DOC asked the court to clarify whether it was ordering the production and redaction of records. CP 379 (DOC seeking "guidance" from the court "as to whether it is ordering the production and redaction of SOTAP clinical treatment files and if so, what records and or portions of records may be capable of redaction as health care information."). DOC's claim here that it cannot deidentify the records is premature until such time as it begins to comply with its obligations under the PRA and collect the records for review and redactions.

Part of DOC's new claim is its assertion: "[t]he fact that these records cannot be deidentified renders them exempt in their entirety." It bases its contention on an argument that even if the patient's name is redacted, the other information in the record "may well allow someone familiar with the patient

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[15] In an act of litigation bad faith, DOC never informed this Court that it had not raised the issue in the trial court. The Commissioner then used the issue as a basis to grant review. See Ruling Granting Discretionary Review at 7-8.

to identify them or someone to easily identify them by minimal research." Petitioner's Brief at 32. DOC's claim is purely speculative; it has not provided any evidence related to its claim. RCW 42.56.550(1) (burden of proof on agency).

Even with the complete lack of evidence, a claim such as that has been already foreclosed by courts who have examined that very issue. See Koenig v. City of Des Moines, 158 Wn.2d 173, 187, 142 P.3d 162 (2006) ("The fact a requester may potentially connect the details of a crime to a specific victim by referencing sources other than the requested documents does not render the public's interest in information regarding the operation of the criminal justice system illegitimate or unreasonable."); see also Bainbridge Is. Police Guild v. City of Puyallup, 172 Wn.2d 398, 414, 259 P.3d 190 (2011) ("An agency should look to the contents of the document and not the knowledge of third parties when deciding if the subject of a report has a right to privacy in their identity."); and SEIU Healthcare 775NW v. Dep't of Soc. & Health Servcs., 193 Wn.App. 377, 401-11, 377 P.3d 214 (2016) (holding that information is not exempt because its disclosure could lead to the discovery of exempt information). Further, "nonexempt information does not become exempt simply because its disclosure may result in figuring out other exempt information." West v. Dep't of Licensing, 182 Wn.App. 500, 510, 331 P.3d 72 (2014) (emphasis in original).

While DOC makes a conjectured averment that it cannot deidentify the SOTP records, it may be that no health care exists in the records. VRP 6 (Mr. Wallin noting "what is unclear at this time is that the program records contain any actual health care information that is defined by statute."). Besides the fact the trial court presumed the existence of health care information based on Mr. Wallin's early assumption and DOC's assertion, VRP 6, 31, the trial court never reviewed the records to determine the issue. Problematically, DOC seems misinformed about what constitutes health care information to begin with. See VRP 11 (DOC counsel arguing that "personal and intimate details" is "health care information"). Those "personal and intimate details" it suggests is protected information is historical facts underlying the later commission of a sexually-based criminal offense, or information that could lead to such. CP 120-21. Facts such as those do not fall under the purview of the UHCIA as health care information.[16]

DOC also points to the "embarrassment and shame" an SOTP participant may experience if identified. Petitioner's Br. at 33. Regardless, convicted sex offenders in Washington "have a reduced expectation of privacy because of the public's interest

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[16] Of note is the fact that according to the SOTP policy, only particular records created by a Psychologist 4 are treated "as confidential, protected health information." And those records are kept separate from the SOTP file. CP 129 (VII.D). The program itself is administered by a counselor or social worker. CP 119.

in public safety and in the effective operation of government." State v. Parris, 163 Wn.App. 110, 118, 259 P.3d 331 (2011) (internal quotation marks and citations omitted). See also RCW 4.24.550 (Finding: Laws of 1990, ch. 3, § 117: legislature noting that "Overly restrictive confidentiality and liability laws governing the release of information about sexual predators have reduced willingness to release information that could be apprporiately released under the public disclosure laws, and have increased risks to public safety."). Thus, an emotional response is an invalid reason to deny the request or claim the records are exempt as DOC does here. See RCW 42.56.550(3) (courts shall take into account the policy of PRA "that free and open examination of public records is in the public interest, even though such examination may cause ... embarrassment to ... others.").

Consequentially, although not part of the record on review, DOC suppresses the fact that the SOTP participants waive confidentiality to the information and records of the SOTP in order to enter the program.[17] That fact negates DOC's unwarranted contention that the "patients' unavoidable fear of

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[17] As noted earlier, Mr. Wallin has submitted a motion to expand the record, to include two SOTP program forms. The forms indicate that the SOTP participant waives DOC's rule of "confidentiality" for most, if not all, records created as part of the program. See Motion to Strike at 6. The evidence counters DOC's contention that SOTP records are confidential. See also, page 5 and n.4; and page 33 n.16, supra.

disclosure and identification could impair the efficacy of the Department's SOTAP program." Petitioner's Brief at 34. That is an invalid reason to deny disclosure. See, e.g., Sargent v. Seattle Police Dep't, 179 Wn.2d 376, 395, 314 P.3d 1093 (2013) ("A general contention of chilling future witnesses is not enough to exempt disclosure.").

Lastly, DOC's entire claim rests on pure speculation and conjecture. It provided no evidence to the trial court that it cannot effectively deidentify the records. It never presented any claim or argument to the trial court, nor provided the records for review. DOC's claim is without merit.

C. The Trial Court Erred By Reducing Mr. Wallin's Award Of Costs As The Prevailing Party Absent Evidence Of Fraud, Inflation, Or Other Malfeasance.

The trial court found that DOC violated the PRA by failing to collect, redact, and produce the SOTP records. A Prevailing party in a PRA action is entitled to an award of all costs incurred in the action. Upon a suggestion by DOC, the trial court improperly reduced Mr. Wallin's award of costs by fifty percent without evidence of fraud or other malfeasance. In addition, a party who prevails on appeal is entitled to an award of all appellate costs.

1. Mr. Wallin Is Entitled To All Trial Court Costs.

To enforce the PRA's policy of full public access to public records, the Act contains a penalty provision which allows the prevailing party to recover "all costs" for the

denial of access to public records. The PRA provides that:

> Any person who prevails against an agency in any action in the courts ... shall be awarded all costs ... incurred in connection with such legal action.

RCW 42.56.550(4). "[T]he PRA's cost-shifting provision is mandatory." Francis v. Dep't of Corr., 178 Wn.App. 42, 48, 313 P.3d 457 (2013).

Mr. Wallin was the prevailing party. Spokane Research Def. Fund v. City of Spokane, 155 Wn.2d 89, 103, 117 P.3d 1117 (2005) (whether a party prevails is a "legal question of whether the records should have been disclosed on request.").

Therefore, Mr. Wallin was entitled to his liberal recovery of "all costs" incurred in litigating this case. See O'Neill, 183 Wn.App. at 25-26 (noting RCW 42.56.550(4) provides for a more liberal recovery of costs); ACLU v. Blaine Sch. Dist. No. 503, 95 Wn.App. 106, 115, 117, 975 P.2d 536 (1999) (same); Lindburg v. Kitsap County, 133 Wn.2d 729, 749, 948 P.2d 805 (1997) (emphasizing that the prevailing party in a PRA case is "entitled to all costs they have incurred in pursuing [the] action"). See also, generally, Blair v. Wash. State Univ., 108 Wn.2d 558, 573, 740 P.2d 1379 (1987) (recovery of expenses in a civil case can include out-of-pocket expenses such as telephone charges, photocopying, and supplies).

In spite of the PRA's plain language, DOC suggested to the court that it reduce Mr. Wallin's costs by 50 percent as an apportionment. CP 524. The trial court did reduce Mr.

Wallin's costs by half after he filed his cost bill. CP 453-56, 550. The trial court erred by reducing his costs without any evidence of inflation, fraud or other malfeasance. Compare Mitchell v. Wash. State Institute of Public Policy, 153 Wn.App. 803, 829, 225 P.3d 280 (2009) ("using the PRA as a vehicle of personal profit through false, inaccurate, or inflated costs is contrary to the PRA's stated purpose ... and [is] not reasonable."). Especially when DOC conceded that "the total amount appears to be generally reasonable in litigating this matter." CP 524.

Mr. Wallin's costs should not have been reduced. Whether Mr. Wallin brought one or four causes of action in one suit, the filing fee and service fee would have been the same. Moreover, Mr. Wallin should not be penalized because he exercised discretion in bringing multiple claims in one suit to conserve judicial resources. Although the other three claims were unsuccessful, they amounted to only a handful of pages. The issue Mr. Wallin prevailed upon has "thousands" of pages at issue. CP 120 (SOTP records estimated to be in the "thousands of pages").

In addition to the error on reduction of costs, the trial court erred by allowing DOC to pay the amount to Mr. Wallin's inmate account instead of his attorney-in-fact. CP 551. However, the payment of costs eminated from Mr. Wallin's personal bank account which DOC's attorney was aware of prior

to her submission of her proposed order. CP 554. DOC's inclusion of payment to Mr. Wallin's inmate account where DOC knows it can then take almost half of it back through DOC's own deductions is an act of bad faith, and it was error for the court to acquiesce.[18]

There is no law requiring DOC to pay the award to Mr. Wallin's prison account. Doing so here where DOC can simply take it right back into its own pocket is underhanded dealing, and should be reproved. The money belongs to Mr. Wallin, not the State. RCW 42.56.550(4). Accordingly, Mr. Wallin can do with it as he pleases, including fairly reimbursing his own personal bank account through his attorney-in-fact.

The trial court's June 21, 2021 order on costs and penalties should be reversed, and all costs incurred in the trial court awarded to Mr. Wallin, with those costs to be paid to Mr. Wallin through his attorney-in-fact.

2. **Mr. Wallin Is Entitled To All Appellate Costs.**

As a prevailing party on appellate review, a party is also entitled to "all costs" incurred on the successful appeal. RCW 42.56.550(4); Koenig v. Thurston County, 155 Wn.App 398, 419, 229 P.3d 910 (2010). As a prevailing party on this appeal, Mr. Wallin requests the award of "all costs" he has incurred on

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[18] Mr. Wallin's prison's Spendable Subaccount is subject to 45% in deductions by DOC per policy DOC 200.000 (Trust Accounts for Incarcerated Individuals).

this review, with those costs to be paid to Mr. Wallin through his attorney-in-fact. RAP 14.1

D. The Trial Court Erred By Disallowing Mr. Wallin To Engage In Discovery On The Issue Of Bad Faith And By Denying An Award Of Daily Penalties Against DOC.

After the trial court found that DOC violated the PRA by unlawfully withholding the SOTP records, Mr. Wallin moved for a stay to engage in discovery on the issue of bad faith. The court denied the stay and proceeded with a hearing on the issue of penalties. The court improperly found that DOC did not act in bad faith when it denied the records, and declined to impose penalties. Further discovery on the factual issue of bad faith is needed, although the record does reflect that DOC has acted in bad faith. Penalties should have been awarded.

1. Further Factual Discovery Is Needed.

A prevailing party in a PRA action is entitled to an award of "an amount not to exceed one hundred dollars for each day that he or she was denied the right to inspect or copy" the public record. RCW 42.56.550(4). This daily penalty provision is mandatory, but the amount awarded is discretionary. Spokane Research, 155 Wn.2d at 102 n.9. In the case of a prisoner request, however, the court must find that the agency acted in bad faith. RCW 42.56.565(1). The burden of proof is on the prisoner to show bad faith. Adams v. Dep't of Corr., 189 Wn.App. 925, 952, 361 P.3d 749 (2015) (placing burden of proof on the requestor to establish bad faith). "Whether an agency

acted in bad faith under the PRA presents a mixed question of law and fact, in that it requires the application of legal precepts (the definition of 'bad faith') to factual circumstances (the details of the PRA violation)." Francis, 178 Wn.App. at 51-52.

When this case commenced, discovery was minimal and focused on the PRA violations. Because the trial court had yet to find a violation, engaging in discovery on the bad faith issue was premature. Even the few questions that Mr. Wallin asked, DOC mostly gave non-answers. CP 393.

Whether an agency acted in bad faith relates to a factual culpability analysis which the trial court cannot engage in without Mr. Wallin providing discovery of factual matters to the court. For instance, did DOC's public records staff refuse to disclose the records it knew it had a duty to disclose? Was their conduct obstinate? Were they being dishonest in their claim of exemption? Did they properly conduct an independent determination that the records were exempt under the statutes cited? Did they withhold records based on Mr. Wallin's status as a prisoner? Did they knowingly ignore relevant judicial decisions? These are just a few examples of facts which the court can use to find bad faith. See, e.g., Adams, 189 Wn.App. at 939-40.

Further, as part of the penalty determination, the court is required to engage in an analysis of the mitigating and

aggravating factors elucidated by Yousoufian v. Office of Ron Sims, 168 Wn.2d 444, 467-68, 229 P.3d 735 (2010). The trial court cannot do so without Mr. Wallin being able to commence discovery on the factual considerations enunciated by the supreme court in Yousoufian.

Without the opportunity for discovery, the trial court's finding that DOC did not act in bad faith was unjust. Thus, it erred, and this case should be remanded to give Mr. Wallin his rightful opportunity to engage in the needed discovery. The trial court's June 21, 2021 order denying penalties should be reversed.

2. DOC Acted In Bad Faith And Penalties Are Warranted.

Although Mr. Wallin was not afforded the opportunity to engage in discovery regarding factual matters related to DOC's actions and whether they amounted to bad faith, or regarding the Yousoufian factors, this court can nevertheless find that DOC had acted in bad faith when it denied Mr. Wallin his right to inspect and copy the SOTP records.

Withholding records based on an indefensible view of the law supports a finding of bad faith. See Adams, 189 Wn.App. at 929, 951 (court holding that "'bad faith' for purposes of imposing penalties under RCW 42.56.565(1) includes an agency's failure to engage in any serious independent analysis of the exempt status of document it withholds"; court also found bad faith for DOC's refusal to heed a prior judicial decision).

DOC's legal position, in that it relied on its own contrary interpretation of RCW 42.56.360(2) instead of relying on the numerous judicial decisions which had already clearly interpreted the statute, see pages 13-14, supra (citing cases); and its indifference to the decision in PLN to withhold records in their entirety, is bad faith.

In PLN, a legal decision against DOC, the DOC had redacted all health care information (identities and information about health care) but had provided the records in redacted form. PLN, 154 Wn.2d at 644-45. But DOC's withholding was even more obstinate here because although it recognized only some of the information was exempt, it still withheld all records in their entirety. CP 172. Moreover, the PLN court discussed former RCW 42.17.312 (current RCW 42.56.360(2)) which incorporated the UHCIA's privacy provisions, whereas DOC here used that statute as the basis to argue the statute plainly excludes the UHCIA from the PRA. "Bad faith" is partly defined as a "dishonesty of belief or purpose". Black's Law Dictionary 159 (9th ed. 2009). For DOC to withhold the records contrary to PLN is a dishonesty of belief and purpose.

The prior decision against DOC in PLN "forecloses any argument by the DOC that it simply didn't realize there was a problem with the legal position it had taken." Adams, 189 Wn.App. at 951. In the same way, its disregard of other judicial decisions which were relevant to this issue went

particularly unheeded by DOC. The bad faith on the part of DOC is strikingly evident.

Coupled with that is the fact DOC's own policies subject SOTP records to the PRA, see CP 542-46; its own policies also differentiate health care records from general program records like the SOTP, see CP 411-12; the SOTP policy only considers particular records created by a Psychologist 4 as "protected, health care information" which are kept separate from the SOTP file, see CP 129 (VII.D); and that SOTP participants waive DOC's rule of confidentiality through informed consent and waiver of information and records before entering the program, see page 6 and n.3-4, supra.[19]

DOC knew, or should have known, its legal position was, is, and will continue to be unjustifiable in light of the facts above. Therefore, it was error for the trial court not to find bad faith on those facts, and its June 21, 2021 order denying penalties should be reversed. This Court should find that DOC acted in bad faith, and remand to the trial court to impose per diem penalties against DOC.

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[19] Mr. Wallin reminds this Court that the DOC forms which he refers to are not a part of the record, but is the subject of his companion motion to add additional evidence to the record. See Motion to Strike.

VII. CONCLUSION

This Court should affirm the trial court's ruling that DOC violated the PRA when it failed to collect, redact, and produce the SOTP records to Mr. Wallin in response to his public record request.

Regarding the issue of costs and penalties, this Court should reverse the trial court and award Mr. Wallin all costs incurred both in the trial court and on appeal, with the payment of those costs to be paid to Mr. Wallin through his attorney-in-fact. Additionally, this Court should find DOC acted in bad faith, and remand for further discovery and for the imposition of the proper penalty amount.

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CERTIFICATE OF SERVICE/FILING

(Pursuant to GR 3.1)

I, Jamie Wallin, certify that on the date below I deposited the foregoing document in the internal Legal Mail system of Washington State Penitentiary, 1313 N. 13th Avenue, Walla Walla, WA 99362 pursuant to GR 3.1, and made arrangements for postage, addressed to:

Cassie vanRoojen, WSBA #44049
Attorney General's Office
PO Box 40116
Olympia, WA 98504-0116

I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

Dated at Walla Walla, Washington this 18th day of April, 2022.

Jamie Wallin